



EPA REGION 2 REVIEW

OF THE

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

PROGRAM RELATING TO SIGNIFICANT VIOLATORS

April 28, 1997





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FORWARD

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We acknowledge NYSDEC's commitment to improve their compliance/enforcement program and the recent actions that they have taken to correct some of the problems noted in our review (see attached NYSDEC press releases).

Special thanks to the following EPA personnel who contributed to this audit: Kenneth Eng, Karl Mangels, Karen Seet, Yue On Chiu, Avia Eyllon, Sue Leung, Barbara McGarry and David Stone.

INTRODUCTION

PURPOSE OF NYSDEC PROGRAM REVIEW

United States Environmental Protection Agency Region 2's (EPA's) review of the New York State Department of Environmental Conservation (NYSDEC) air enforcement program was conducted to:

Determine whether the NYSDEC identified significant violators (SVs) in accordance with EPA's Timely and Appropriate Policy for Significant Violators (SV/T&A);

Identify whether NYSDEC reported these SVs to EPA; and

Obtain an overall perspective of how well the NYSDEC's air compliance/enforcement program is operating with respect to SV/T&A.

EPA's review of the NYSDEC program was conducted pursuant to an EPA HQ request to Regional Offices to evaluate state SV reporting following a recent audit performed by the Office of the Inspector General (IG) of the Pennsylvania Department of Environmental Protection (PADEP) air enforcement program.

METHODOLOGY OF NYSDEC PROGRAM REVIEW

<u>Identified the purpose of the program review and drafted review procedures</u> -- A draft proposal for the program review was developed using procedures similar to those used in the PADEP audit.

Refined program review procedures based upon discussions between EPA and NYSDEC -- EPA met with NYSDEC in Tarrytown on January 22, 1997 and presented the draft procedures. There were subsequent communications between EPA Region 2 and NYSDEC to refine the procedure to conduct this program review.

Selected one large NYS region (Region 2) and one mid size region (Region 8) for evaluation - NYSDEC Region 2 consists of the five boroughs of New York City and is the region with the largest number of major sources in the State. Region 8 consists of 11 counties in midwestern New York State.

<u>Determined number of files to be reviewed in each region based upon source listings provided by NYSDEC</u> -- NYSDEC inspectors use a Notice of Compliance Determination (NOCD) form to document the compliance status of a source after an inspection. Thus, the NOCD list is expected to be an accurate source of information regarding the number of sources inspected by NYSDEC. Therefore, EPA used the NOCD lists provided by NYSDEC which indicated that

during FFY'95¹ and FFY'96 NYSDEC Region 2 conducted 515 inspections while NYSDEC Region 8 conducted 26 inspections. Based on these numbers and factoring in available resources, EPA decided to target 25% of NYSDEC Region 2's files and 100% of Region 8's source files for review (a total of 130 and 26 files respectively). In addition, EPA decided to randomly review the files for 25 major² sources in each region (from major source lists provided by NYSDEC) that were not listed as having been inspected during the review timeframe.

Identified the names of some of the files that EPA intended to review to the NYSDEC so that they could preview them -- NYSDEC wanted to concurrently review some of the files that we wanted to review to corroborate their results with ours. As a result, three days prior to the start of the review, EPA gave NYSDEC the names of 15% of the source files EPA planned to review.

<u>Discussed program review methodology with NYSDEC personnel in each regional office</u> -- On February 9, 1997, EPA met with officials from the two NYSDEC regional offices (Regional Director, Regional Air Pollution Control Engineers, section chiefs) to discuss the purpose and methodology of our reviews.

Conducted Program Review -- During the week of February 9, 1997, EPA sent two compliance officers to each of the NYSDEC regional offices under review (Region 2 & Region 8) to review the source files and to interview key NYSDEC staff on the implementation of EPA's SV/T&A policy, data management issues and NYSDEC's compliance/enforcement standard operating procedures. EPA reviewed source files using a checklist (Attachment #2). Copies of the completed checklists were given to the respective regions at the end of each day of the review.

<u>Discussed preliminary program review findings with NYSDEC</u> -- Approximately a week after the file reviews were completed, EPA met with NYSDEC in Albany to discuss preliminary findings. This was done to verify the accuracy of information extracted from the files, to gather additional information, and to clarify all outstanding issues before the report was drafted.

<u>Forwarded draft report to NYSDEC for review and comment before finalization</u> -- This was done to ensure that any errors or inaccuracies would be corrected before the report is finalized.

¹ Federal Fiscal Year is from October to September, i.e., FFY'95 would be from October 1, 1994 to September 30, 1995.

 $^{^2}$ Since NY's Operating Permit Program was not approved by EPA Region 2 until November, 1996, the pre-1990 definition of major source was utilized in our review.

DEVIATIONS FROM PLANNED METHODOLOGY

NYSDEC Region 2:

EPA intended to review up to 25% (or 130) of the 515 sources inspected during FFY'95 and FFY'96 and 25 additional major sources that were <u>not</u> inspected during this period. However, because the file reviews took more time than originally anticipated, it was decided to limit coverage to 82 of the sources that had been inspected (49 major and 33 minor) during FFY'95 and FFY'96, and 18 of the major sources that had not been inspected. However, the 67 major source files reviewed in NYSDEC Region 2 represents 13% of the 490 major sources in NYSDEC Region 2 which is comparable to the 12% of major sources reviewed by the EPA IG in Pennsylvania (PA).

NYSDEC Region 8:

EPA reviewed a total of 50 files as originally planned (25 "inspected source" files (major and minor) and 25 files for "not inspected major sources"). However, the list of NYSDEC inspections conducted in FFY'95 and FFY'96 (e.g. "NOCD" list) provided by NYSDEC Albany prior to our review was determined to be incomplete. They had in fact inspected 65 sources (major & minor) in FFY'95/96. Therefore, the files reviewed did not represent 100% of the universe. EPA relied on a FFY'95/96 Source Management System (SMS) inspection list, not the "NOCD" list, to select the 25 files of inspected sources and cross checked this list with the major source list provided by NYSDEC Albany to select the additional 25 major source files that were not inspected.

<u>DIFFERENCES BETWEEN NYSDEC PROGRAM REVIEW AND THE PADEP AUDIT</u>

- 1. In PA, the EPA IG audited the population of potential SVs by examining every Notice of Violation (NOV) that was issued and sent to EPA Region 3. Since NYSDEC does not issue NOVs, the review of NYSDEC was based on a random sample of 107 sources (major & minor) that were inspected during FFY'95/96 and 50 major sources that were not.
- 2. In PA, the EPA IG dismissed minor sources and focused on NOVs issued to major sources. In NY, EPA's review also primarily focused on major source files. However, some minor source files were reviewed to determine a violation rate and ensure the sources did not meet the criteria of a SV.
- 3. In PA, the EPA IG focused on whether or not SVs were identified and reported to EPA. In NY, EPA's review also dealt with the identification and reporting of SVs. However, other aspects of NYSDEC's enforcement program were also evaluated to obtain a better understanding of their enforcement program and how it affects implementation of the SV/T&A Policy (i.e. SOPS, organizational structure, data management systems,etc.).
- 4. In PA, the EPA IG spent five months surveying EPA Region 3 and PADEP procedures and an additional five months conducting the file audit. In NY, EPA spent four weeks surveying NYSDEC and approximately one week conducting the review.

5. In PA, the EPA IG audit examined one fiscal year. In NY, EPA's review covered two Federal fiscal years (FFY'95 & FFY'96) in order to more accurately assess NYSDEC's record in identifying and responding to SVs.

FINDINGS

NYSDEC SV IDENTIFICATION AND REPORTING

EPA's findings in this report (see Table I) are based on the definition of SVs as defined in EPA's SV/T&A Policy. Under this policy, significant violations by a major source would only be considered "addressed" by a legally enforceable and expeditious administrative/judicial order. Thus, other actions that NYSDEC may have taken in response to violations found (e.g., compliance assistance) were not recognized as appropriate actions to address violations at these sources.

EPA reviewed a total of 150 source files in NYSDEC Regions 2 and 8. Of the 150 source files reviewed, 116 of the files pertained to major sources and 34 of the files pertained to minor sources. Of the 116 major sources, 73 had been inspected and 43 had not been inspected within the timeframe used in this review. A total of 27 violations were found among the 150 files reviewed (a 18.0% violation rate).

Of the 73 major sources inspected, EPA found that 9 were SVs, none of which had been reported to EPA. No significant violations were found among the 43 major sources not inspected in this timeframe. This would constitute an SV violation rate of 9 of 73 or 12.3%. In addition, none of the 9 have been "addressed" (as defined by SV/T&A Policy which requires a penalty) by NYSDEC. At the time of the file review, 5 of the 9 had come into compliance without an "addressing" action by NYSDEC.

The remaining 18 sources with violations pertained to major sources involving regulations that were not federally enforceable (not SV by definition) or to minor sources. At the time of the review, 7 of the 18 have already come into compliance without an "addressing" action by NYSDEC.

TABLE I NEW YORK STATE DEC FILE REVIEW SUMMARY CHART

Number of Files Reviewed During EPA Region 2 Program Review		NYSDEC Region 2 8			
Total files reviewed(major and minor sources) ¹		50	150		
# major sources inspected by NYSDEC in FFY'95 and FFY'96 ²		24	73		
# major sources not inspected in FFY'95 and FFY'96		25	43		
# minor sources inspected in FFY'95 and FFY'96		1	34		
Total Violations Documented in Source Files (Observed during EPA Region 2 file review)		11	27		
# SV Violations of federally- enforceable regulations by a major source	6	3	9		
SV as a % of total violations found			33.3%		
# Non-SV (Violation of non-federally-enforceable regulation by a major source / Minor violation by a major source / Violation by a minor source)	5/0/5	6/0/2	11/0/7		
Non SV as a % of total violations found			66.7%		
SV reported to EPA in FY'95/96 (not associated with this EPA Region 2 program review)		2^3	2		
SV found during the review that were not reported to EPA		3	9		
Statistics on SV Found During the EPA Region 2 File Review					
SV addressed under SV/T&A Policy by state		0	0		
# addressed in timely fashion		0	0		
# addressed with penalties	0	0	0		
SV unaddressed under SV/T&A Policy by state	6	3	9		
In compliance without assessed penalties	3	2	5		
Out of compliance	3	1	4		
Statistics on Non-SV Found During the EPA Region 2	2 File Revie	ew			
Non SV that came into compliance with penalties assessed		1	1		
Non SV that came into compliance without penalties		1	7		
Non SV that remain unaddressed		5	6		
Non SV almost addressed (referral to legal)		1	4		

¹ There are 770 A1 and A2 sources ("major") listed in AIRS for NYSDEC Regions 2 and 8. This number will be used in Table II to make a comparison of the percentages of major sources covered by the PA and NY file reviews. There are 490 majors in NYSDEC Region 2 and 280 majors in NYSDEC Region 8.

² Some of the NYSDEC Region 2 inspections were not reported in the NYSDEC SMS list.

³ Two "SV" were reported by NYSDEC Region 8. One is the University of Rochester (a file not reviewed by EPA). The other is Anchor Glass (a file reviewed by EPA and involved a non-SIP violation). The University of Rochester case has been referred to NYSDEC's legal department. The Anchor Glass case has been addressed with a consent order and an assessed penalty.

OBSERVATIONS NOTED DURING PROGRAM REVIEW

Knowledge of SV/T&A Policy

NYSDEC Regional staff are not sufficiently knowledgeable on SV/T&A Policy. Various NYSDEC Regional staff are involved in reporting violations to Albany and are minimally involved in actions required by the SV/T&A Policy. Some NYSDEC Regional staff were not aware of the SV/T&A policy at the time of our review.

SV Data Reporting

NYSDEC's SV reporting process to EPA needs improvement. There is confusion on how SV information is reported to EPA since roles and responsibilities of staff within NYSDEC are not clearly defined.

Penalties

EPA identified 9 SVs in our program review of which 5 had already come into compliance at the time of our review. Although our SV/T&A policy requires that appropriate penalties be assessed against SVs, none of the 5 sources currently in compliance had penalties assessed against them. EPA and NYSDEC need to review all SV actions to ensure that appropriate enforcement actions are taken.

Inspection Documentation

Inspection reports were not found in the majority of the source files reviewed. Instead, NOCDs were primarily used by NYSDEC to document what equipment or emission points were observed during an inspection and note a particular compliance status, i.e., non-compliance, in compliance, source shut down, source removed, or other. The NOCDs are very brief and, in many cases, do not adequately describe what was done during the inspection. This makes it difficult to verify the compliance status of a source as reported by a inspector.

The NOCD, however, does not reflect the compliance status of a facility as a whole. Several instances were found where a NOCD indicated compliance at one portion of the source while enforcement action was pending at another portion of the facility.

Data Systems

EPA and NYSDEC each have their own data systems, Aerometric Information Retrieval System (AIRS) and Source Management System (SMS), respectively which track compliance and enforcement information. SMS does not have the capability of transferring inspection data into AIRS and NYSDEC, at the time of our review, was not a direct user of AIRS. As a result, we had to rely on SMS not AIRS to obtain the lists of NYSDEC sources for this review. As a result of this review, EPA also observed some inconsistencies in the way the NYSDEC regional offices were reporting their

inspection numbers into the SMS system.

Additionally, the review found that the A1 and A2 emission classifications for many of the inspection targets have changed over the years because of efforts by the target sources to reduce their emissions and "cap out" of various applicable regulations. Since NYSDEC has traditionally placed most of their inspection resources on A1 and A2 sources because of their large emission potential, the A1 and A2 classifications in SMS need to be accurate so that NYSDEC will not target A1 or A2 sources that are actually "minor" sources. This file review found that these two NYSDEC regions, as well as the remaining seven, are aware of this and have been making efforts to correct the source classifications in their system.

NYSDEC is currently developing a new data system that will include both permitting and enforcement information. NYSDEC believes that all of the data issues will be addressed once the new system is in place. NYSDEC anticipates that it will be approximately one and a half years before the new system will be operational for enforcement purposes. In the meantime, NYSDEC has started to enter pertinent compliance data, including SV related information, directly into AIRS.

FOLLOW-UP and NEXT STEPS

NYSDEC FOLLOW-UP ACTIONS TAKEN

Following the Tarrytown meeting on January 22, 1997, NYSDEC:

conducted seminars to educate their regional staff on the requirements of the SV/T&A Policy.

created a unit in Albany to develop new standard operating procedures (SOP) to strengthen their staff's understanding and implementation of applicable enforcement policies, including auditing the regional offices to ensure conformity with the SV/T&A policy. Once fully implemented, these SOPs will ensure that the regions have appropriate and consistent documentation/enforcement procedures to follow.

obtained access to AIRS and has started to enter requisite SV information into AIRS.

As of 12/96, the state had identified a total of 26 SVs in the AIRS database.

As of 2/97, the state had identified a total of 56 SVs in the AIRS database.

As of 4/15/97, the state had identified a total of 152 SVs in the AIRS database.

has designated an enforcement coordinator in each regional office to ensure that enforcement matters are pursued in a timely fashion. In addition, NYSDEC has announced plans to increase its inspections at major sources of air pollution (as outlined in the SV/T&A Policy), and at sources that emit toxic pollutants.

NEXT STEPS

- EPA will provide a list of specialized air staff to NYSDEC to facilitate communication between staff
 in both agencies in specialized areas. There is a need for EPA/NYSDEC staff to share and
 understand each others' issues and concerns in light of new Federal and State regulations, and
 NYSDEC's Title V program.
- 2. NYSDEC will appoint a task force within DEC to identify issues of concern to the Division of Air, review the division's staffing and structure and make recommendations to improve its overall effectiveness and enforcement performance.
- 3. NYSDEC will establish a computer system that will allow DEC staff to communicate directly with EPA's Region II office in New York City as well as EPA's national database on air enforcement and compliance matters.
- 4. EPA will continue to work with NYSDEC to strengthen and enhance their enforcement program. EPA and NYSDEC will meet on May 14, 1997, to discuss measures to be taken by NYSDEC to address the issues raised in this report. In addition, a joint enforcement strategy will be developed to address the newly identified universe of SVs.